BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

GAY ANN HARPER	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,044,629
MARIA COURT	)	
Respondent	)	
AND	)	
	)	
KANSAS ASSOCIATION OF HOMES FOR THE AGING INSURANCE GROUP	)	
Insurance Carrier	)	

ORDER

Respondent appeals the May 5, 2009, preliminary hearing Order of Administrative Law Judge Nelsonna Potts Barnes (ALJ). Claimant was awarded benefits in the form of temporary total disability compensation (TTD) and medical treatment after the ALJ determined that claimant's deviation from her employment was minor and did not constitute an abandonment of her employment sufficient to take the accident outside the course of her employment with respondent.

Claimant appeared by her attorney, R. Todd King of Wichita, Kansas. Respondent and its insurance carrier appeared by their attorney, Michael L. Entz of Topeka, Kansas.

This Appeals Board Member adopts the same stipulations as the ALJ, and has considered the same record as did the ALJ, consisting of the deposition of Gay Ann Harper dated March 30, 2009; the transcript of Preliminary Hearing held April 7, 2009, with attachments; and the documents filed of record in this matter.

ISSUE

Did claimant suffer an accidental injury which arose out of and in the course of her employment with respondent, or was the deviation sufficient to deny claimant benefits under the Kansas Workers Compensation Act?

FINDINGS OF FACT

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order should be affirmed.

Claimant worked as a certified medication aide (CMA) for respondent for four years. Respondent's facility was a single-unit, one-story building which housed 35 residents in an assisted living environment.

On February 13, 2009, claimant was working for respondent when a cook at respondent's facility drove a red Hummer into the parking lot. A co-worker, Tammy Hollins (another CMA at respondent's facility), expressed a desire to see the Hummer up close. Claimant's supervisor, Valerie Simpson (respondent's director of clinical services), also wanted to see the Hummer. At that point, claimant, Ms. Simpson and Ms. Hollins went out of the building and into the parking lot. Apparently, Ms. Simpson and Ms. Hollins went through the same door, into the parking lot ahead of claimant. Claimant stopped in a room identified as the Great Room to open the blinds and curtains as the room was dark. She exited the building approximately 15 seconds after the others had entered the parking lot. As claimant went out of the building through a side door, she attempted to step over a planted area which appeared to be muddy. Claimant tripped and fell, breaking her left tibia and fibula and spraining her right foot. Claimant underwent surgery to repair the breaks the next morning.

Claimant admitted that this was not a scheduled break as she was not escorting a resident of respondent's facility, which would have been one of her normal activities. The intention was to go into the parking lot, look at the Hummer and return to the facility. Claimant also acknowledged that the trip into the parking lot had nothing to do with her job duties for respondent. Claimant does not remember which of the three originally said that they should go outside and look at the Hummer. Claimant testified that it was a mutual decision between the three. Claimant remained on the clock and was acting under her supervisor's authority at the time of the accident. The parking lot was part of respondent's premises and only employees, residents and visitors to respondent's facility would use the lot.

Ms. Simpson testified that Ms. Collins exited the building first, with Ms. Simpson going second. Claimant followed shortly thereafter. Almost immediately, Ms. Simpson began to hear the screams from claimant. Ms. Simpson testified that she and Ms. Collins exited the building through a different door. However, all were going to the parking lot to look at the Hummer. Ms. Simpson agreed that she expressed a desire to look at the Hummer. Ms. Simpson made no attempt to stop the other two from going into the parking lot. Ms. Simpson knew that both claimant and Ms. Collins were going into the parking lot to look at the Hummer. Ms. Simpson is not aware that she or either of the other two

employees are to be disciplined for this situation. Ms. Simpson did nothing to stop either of the other employees from going into the parking lot to look at the Hummer.

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.[1]

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.[2]

> If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.[3]

The two phrases "arising out of" and "in the course of," as used in K.S.A. 44-501, et seq.,

> . . . have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service. The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment."[4]

Respondent argues that claimant abandoned her job to go into the parking lot. The trip into the parking lot had nothing to do with her normal job duties. This "deviation" was for a personal or nonbusiness-related activity. None of these claims are seriously disputed by claimant. Claimant does argue that the deviation was so minor as to be inconsequential. The ALJ found the deviation to be minor and did not constitute an

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[1] K.S.A. 2008 Supp. 44-501 and K.S.A. 2008 Supp. 44-508(g).

[2] *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

[3] K.S.A. 2008 Supp. 44-501(a).

[4] *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); *citing Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

abandonment of claimant's employment so as to deprive her of coverage under the Workers Compensation Act. This Board Member agrees. Claimant's deviation was minor, spur-of-the-moment, and involved only a slight shift from her normal work duties.

It is also argued in this record that this incident involved horseplay and is, thus, non-compensable. The activities could be seen as a form of horseplay. However, this horseplay was done not only with the permission of claimant's immediate supervisor but also with her active participation. A participant in horseplay may recover compensation for an injury where the horseplay has become a regular incident of the employment.[5] Here, the one-time incident had not become a regular incident of employment, as it was a one-time incident. But, it was done with the knowledge, consent and participation of claimant's immediate supervisor. This Board Member finds that claimant's actions on the date of accident did not constitute an abandonment of her employment or horseplay so as to deprive her of the benefits of the Kansas Workers Compensation Act.

> It is the intent of the legislature that the workers compensation act shall be liberally construed for the purpose of bringing employers and employees within the provisions of the act to provide the protections of the workers compensation act to both. The provisions of the workers compensation act shall be applied impartially to both employers and employees in cases arising thereunder.[6]

The award of benefits in this matter is, therefore, affirmed.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[7] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2008 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

CONCLUSIONS

Claimant has satisfied her burden of proving that she suffered an accidental injury which arose out of and in the course of her employment with respondent. The award of benefits by the ALJ is, therefore, affirmed.

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[5] *Thomas v. Manufacturing Co.*, 104 Kan. 432, 179 Pac. 372 (1919); *Carter v. Alpha Kappa Lambda Fraternity*, 197 Kan. 374, 417 P.2d 137 (1966).

[6] K.S.A. 2008 Supp. 44-501(g).

[7] K.S.A. 44-534a.

DECISION

WHEREFORE, it is the finding, decision, and order of this Appeals Board Member that the Order of Administrative Law Judge Nelsonna Potts Barnes dated May 5, 2009, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of August, 2009.

HONORABLE GARY M. KORTE

c: R. Todd King, Attorney for Claimant
Michael L. Entz, Attorney for Respondent and its Insurance Carrier
Nelsonna Potts Barnes, Administrative Law Judge